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No. 96-437

In The

Supreme Court of the United States

October Term, 1996

IN RE: BRUCE YOUNG AND NANCY YOUNG,

Debtors.

JULIA A. CHRISTIANS, TRUSTEE,

Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

I. HAVING RECENTLY GRANTED CERTIORARI IN *CITY OF BOERNE V. FLORES* TO CONSIDER THE CONSTITUTIONALITY OF RFRA, THIS COURT SHOULD ALSO GRANT CERTIORARI IN THIS CASE TO COMPLETE THE CONTEXT OF ITS CONSTITUTIONAL SCRUTINY OF RFRA.

This Court recently granted certiorari in *City of Boerne v. Flores* (No. 95-2074) to consider the constitutionality of RFRA in light of the principle of Separation of Powers and the principle of federalism. *Flores* involves the invalidation of a local ordinance pursuant to RFRA.

Like *Flores*, the present case also involves the issue of RFRA's constitutionality under the principle of Separation of Powers. There is obviously overlap between *Flores* and the present case.

Because the present case involves federal law, however, the focus of the Separation of Powers issue here would be RFRA's constitutionality as applied to federal law. RFRA's defenders[1] assert that the Separation of Powers issue in the context of a federal statute is "quite distinct" from the Separation of Powers issue presented in *Flores*. Brief in Opposition to Petition for Writ of Certiorari at 8-9. Given the fact that RFRA's defenders apparently wish to reserve the argument that RFRA's constitutionality may depend upon whether state or federal law is involved, this Court cannot fully address the issue of Congress' constitutional power to enact RFRA without granting certiorari in a case, like the present case, that involves federal law rather than state or local law. Accordingly, the present case enables this Court to address the full issue of whether RFRA violates the principle of Separation of Powers.

The present case also provides an excellent set of facts by which to evaluate RFRA's validity under the Establishment Clause. The

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[1]The same attorney is counsel of record both for the Church in the present case and for the church in the *Flores* case.

present case clearly illustrates, for all to see, that RFRA compels some people involuntarily to subsidize other persons' religious beliefs, in violation of the most fundamental and long-standing constitutional principles.

II. IF THIS COURT DOES NOT GRANT CERTIORARI IN THE PRESENT CASE, IT SHOULD HOLD THE PRESENT CASE PENDING DECISION OF *FLORES*.

In the event that this Court decides not to grant certiorari in the present case, the Court should hold the case pending the decision of *City of Boerne v. Flores*, because of the overlap between this case and *Flores*.

III. THE CONSTITUTIONAL ISSUES WERE PRESENTED TO THE COURT OF APPEALS.

Respondent Church asserts that "one simple fact is dispositive fact in this Court: *petitioner never presented to any court below the constitutional questions allegedly presented in the petition.*" Opp. at 1 (emphasis in original).[2] Respondent Church could not be more wrong. The constitutional questions were repeatedly presented to the court below.

The appeal to the Eighth Circuit was fully briefed by both sides prior to the enactment of RFRA.[3] Following RFRA's enactment, at the request of the Church, the court of appeals ordered the parties, on only two weeks' notice, to brief the "application of

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[2]The Brief in Opposition to Petition for Writ of Certiorari is cited as Opp. The Petition for Writ of Certiorari, and the Appendices thereto, are cited as Pet. Page numbers beginning with A are part of the Appendices.

[3]The Church states that the constitutionality of RFRA was not briefed in "the original briefs" before the Court of Appeals. Brief in Opposition to Petition for Writ of Certiorari at 6. The Church omits to inform this Court, however, that the original briefs were filed well before RFRA was even enacted. It is absurd to assert that the Trustee should have addressed the constitutionality of a non-existing statute.

RFRA" to the case. The briefs were limited to ten pages. *See* Order dated November 24, 1993. The Trustee's ten-page brief covered, among other things, the issues of: (1) the propriety of the court of appeals' consideration of RFRA; (2) RFRA's retroactivity; (3) whether the Debtors were "substantially burdened" by recovery of their gift to the Church; and, (4) whether the Bankruptcy Code serves a "compelling governmental interest." **In addition, contrary to the Church's statement, the Trustee also argued in the ten-page brief that if the Church were to prevail by means of RFRA, the Eighth Circuit would unconstitutionally be endorsing certain religious practices.** Obviously, given the severe constraints of time and space imposed by the court of appeals, and the large number of issues covered by the brief, the Trustee could not have exhaustively briefed any issue relating to RFRA. Nevertheless, here is what the Trustee wrote concerning the constitutionality of RFRA, in the first instance in which the Trustee could possibly have addressed RFRA:

> The Restoration Act [i.e., RFRA], however, specifically provides that it is not to "be construed to affect, interpret, or in any way address" the Establishment Clause of the First Amendment. Restoration Act at § 7. Accordingly, the Restoration Act is simply not applicable to Appellee's [sic; the Trustee must have meant "Appellant's"] newly-asserted constitutional claim. ...
>
> If Appellant were permitted to assert a claim that its free exercise rights were infringed upon by the implementation of the Bankruptcy Code, the Court, in effect would be endorsing religions that value tithing over those that do not prioritize tithing or those that value community service over tithing. Thus, the Court would be unnecessarily interfering with the free exercise of religion [sic; the Trustee's argument was properly grounded in the concerns of the Establishment Clause, not the Free Exercise Clause] guaranteed under the First Amendment.

Appellee's Supplemental Brief dated December 8, 1993, at 6 n.4,

7-8 n.6. The Church is simply wrong, therefore, to assert to this Court, Opp. at 6, that the Trustee's brief concerning RFRA did not raise the constitutional argument.[4]

At oral argument, the Trustee again expressly and repeatedly argued that if RFRA meant that the Trustee could not recover the Debtors' pre-bankruptcy transfers to the Church, RFRA would violate the Establishment Clause. *See* quotations from oral argument in Pet. at 26. The Trustee did not make only conclusory statements about the Establishment Clause and then rest, as the Church suggests. See Opp. at 6. Rather, as the audiotape of oral argument demonstrates, the Trustee repeatedly developed the argument that if RFRA prohibited the Trustee's recovery of the pre-bankruptcy gifts to the Church, the creditors whom the Trustee represents would be forced to sacrifice their rights in order to support the Debtors' Church. For example, the Trustee argued:

> This latent property right of bankruptcy trustees to recover the gifts of insolvent debtors exists of course in favor of the debtors' creditors -- after all, the trustees are trustees for the creditors. The property rights of the trustee, therefore, are for the benefit of the debtors' creditors so that the creditors can recover at least some portion of the debts justly owed to them by their debtors. If the creditors were required to forego their right to partial repayment of their debts because their debtors had given their property to a church, as opposed to some secular institution like the Red Cross, very clearly the creditors would be giving up their rights in order to support the debtors' religious preferences.

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[4]The Church also asserts that the Trustee should have discussed the constitutionality of RFRA in "briefs addressed to the intervention of the United States." Opp. at 6. The United States, however, intervened on behalf of the Trustee, arguing in its brief that RFRA should not be interpreted to prohibit the Trustee's recovery of the Debtors' pre-bankruptcy transfers to the Church. The Trustee, therefore, had no reason to submit a brief concerning the United States' intervention.

The Trustee further pressed the constitutional arguments in her post-hearing submissions in response to the Church's post-hearing written arguments.

The Establishment Clause implications of the Church's position were also addressed by the bankruptcy court and the district court, both of which held that to inquire into the value of the Debtors' religious beliefs, as the Church requested, would result in the sort of entanglement that the Constitution forbids.[5] *See* Pet. at A73, A93.

The Church also asserts that the court of appeals "held" that the Trustee had "waived" the constitutional challenges to RFRA. The Church is wrong. The court of appeals merely stated, incorrectly, "The parties did not raise the constitutionality of RFRA, and we do not consider the constitutionality of RFRA." Pet. A22. There was never any "holding" of "waiver." There was no analysis of any issue of waiver. The court of appeals never even mentioned waiver.[6]

In any event, either the court of appeals made a mistake in failing to recollect the arguments the Trustee had made more than nineteen months earlier, when the case was briefed and argued, or, if the Church is correct, the court of appeals consciously decided to rule that the constitutional arguments were not before it. Either way, the court of appeals was wrong not to consider the constitutional arguments that the Trustee presented in her original brief concerning RFRA, in her oral argument, and in responses to the Church's post-hearing written argument.

The Church's "waiver" argument boils down to the idea that this

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[5]This point rebuts the Church's incorrect argument that "[t]he Trustee's Question 2, whether RFRA violates the entanglement prong of this Court's Establishment Clause doctrine, was never presented below." Opp. at 6.

[6]The Church also argues that because the Trustee mistakenly failed to have the constitutional challenge certified to the Attorney General, the Trustee could not have been raising constitutional challenges. Opp. at 8. But the court of appeals' decision itself in this case disposes of the Church's argument: "[f]ailure to notify the Attorney General is not a jurisdictional defect, and belated notice satisfies any requirement. Certification has occurred even after judgment at the appellate level." Pet. at A10 (citations omitted).

Court should not care if an appellee has been deprived of constitutional rights when a court of appeals incorrectly recollects, or incorrectly decides, that the constitutional arguments were not made. It is the essence of this Court's function, however, to care about the deprivation of constitutional rights. The Trustee made the constitutional arguments. Procedural due process requires that those arguments be considered. Enforcement of constitutional rights cannot become a matter of the discretion of the appellate courts.

CONCLUSION

The Trustee requests that this Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit or, at least, hold the case pending the decision of *City of Boerne v. Flores* (No. 95-2074). In the alternative, the Trustee requests that this Court, in the exercise of its supervisory powers, remand the case to the court of appeals to address the parties' constitutional arguments.

Respectfully submitted,

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